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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 2007

CARRIE LANE
Petitioner,

vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the Texas Twelfth Court of Appeals at Tyler, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals err in holding that the admission of false and misleading testimony by state witnesses did not violate petitioner's constitutional rights to a fair trial and to due process of law.

LIST OF PARTIES TO THE PROCEEDING

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Respondent State of Texas

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i. (a) Opinion of Texas Fourteenth Court of Appeals, Delivered December 20, 2006 affirming Petitioner's conviction for possession of a controlled substance.

(b) Order from the Texas Court of Criminal Appeals showing refusal of Petitioner's Petition for discretionary review by the Texas Court of Criminal Appeals on September 17, 2007.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner Carrie Lane respectfully petitions the Court for a writ of certiorari to review the Texas Fourteenth Court of Appeals' affirmation of Petitioner's conviction for Possession of a controlled substance.

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

i. Date of Order Sought to be Reviewed. The Texas Court of Criminal Appeals Order September 17, 2007 denying petition for discretionary review of the opinion delivered December 20, 2006 by the Twelfth Court of Appeals, Tyler, Texas affirming Petitioners conviction for possession of a controlled substance.

ii. Rehearing. No motion for rehearing was filed.

iii. Statement Regarding Rule 12.5. No reliance on Rule 12.5 is made.

iv. Statutory Provision Believed to Confer Jurisdiction. 28 U.S.C.A. § 1257(1) (West 2001).

v. Statement Regarding Rule 29.4(b) & (c). Rule 29.4(b) & (c) do not apply to this Petition.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Under the Sixth Amendment to the United States Constitution,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST., amend. VI (West 2001).

Under the Fourteenth Amendment to the United States Constitution,

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced

in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but

all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST., amend. XIV (West 2001).

STATEMENT OF THE CASE WITH MATERIAL FACTS, AND BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The offense for which Appellant stands convicted occurred on April 18, 2006 on I-20 in Smith County, Texas.

On April 18, 2006, Appellant was traveling eastbound on I-20 with her boyfriend and the Co-Appellant in this case Joseph Lopez. (See R.R. Vol. 3, Page 43). The two were traveling from Dallas, TX to Longview, TX. (See R.R. Vol. 3, Pages 32, 83, 116, 223). Appellant was driving a blue Chevy Trailblazer. (See R.R. Vol. 3, Pages 43, 186).

Trooper Kenneth Richbourg and his partner

Trooper Burkett were patrolling I-20 on April 18, 2006. (See R.R. Vol. 3, Pages 42, 186). Trooper Richbourg claimed he observed Appellant make a lane change from the inside to the outside lane without properly signaling. (See R.R. Vol. 3, Pages 42, 50). At the time that Trooper Richbourg supposedly witnessed the unsignaled lane change, the troopers were at least one to two football fields away (See R.R. Vol. 3, Page 59) with other cars on the road, being a heavier trafficked interstate. (See R.R. Vol. 3, Page 43). The trooper saw Appellant's vehicle for only a matter of seconds. (See R.R. Vol. 3, Page 59) having been less than a minute removed from a previous traffic stop. (See R.R. Vol. 3, Page 60).

Trooper Richbourg made contact with Appellant and asked her to exit the Trailblazer to the rear of the Trailblazer. Trooper Richbourg

claimed he could smell the odor of marijuana coming from the Trailblazer. (See R.R. Vol. 3, Page 46). However Trooper Richbourg's partner could not smell the odor of marijuana when he first approached the Trailblazer. (See R.R. Vol. 3, Page 55). As a matter of fact, Trooper Richbourg's partner could not smell the odor of marijuana until the two troopers discussed Trooper Richbourg smelling the marijuana.

Eventually Trooper Richbourg searched the Trailblazer. During the search, Trooper Richbourg found a plastic cup in the cup holder between the two front seats in the Trailblazer. (See R.R. Vol. 3, Pages 75-76). The trooper found in the plastic cup 225 grams of a white crystalline substance (See R.R. Vol. 3, Pages 76-77) later determined to be methamphetamine. (See R.R. Vol. 3, Page 178).

Appellant moved to have the search of the

vehicle suppressed on the basis there was no reasonable suspicion to effectuate the original stop of the vehicle. Additionally, Appellant argued that there was a lack of probable cause to allow a subsequent search once the initial stop was initiated. (See R.R. Vol. 3, Page 63). The court denied Appellant's motion to suppress.

After the trial was completed, Appellant was convicted by the jury and the Jury assessed punishment at Life incarceration in the Texas Department of Criminal Justice – Institutional Division. The State only put on one witness during punishment, and that was a DEA Special Agent Joseph Downing. Agent Downing estimated 45000 people as the amount of people that could get high from the 225 grams of methamphetamine Appellant was convicted of possessing. (See R.R. Vol. 5, Page 53). 45000 people would be over half

the population of Smith County. (See R.R. Vol. 5, Page 53)

The amount that Agent Downing was using for a street dose was .005 grams of methamphetamine (See R.R. Vol. 5, Page 52). The methamphetamine in question in this case was a form of methamphetamine known as ice. (See R.R. Vol. 3, Page 220). Sergeant Bond, a Department of Public Safety Narcotics officer, testified that a gram of ice would produce 10 – 15 hits, or street doses. (See R.R. Vol. 3, Page 215).

The five milligram (.005 grams) dose that Agent Downing used in his testimony is the normal dosage of the tablet for the prescription form of methamphetamine. This would be what is considered a therapeutic dose, which is much smaller than a hit street dose. (See C.R. Vol. 1, page 101). The company that makes the 5

milligram tablet of methamphetamine in their own filings to the food and drug administration said that usual effective daily dose is 20 to 25 milligram daily. This would mean the company that makes the legally prescribed 5 milligram methamphetamine pill acknowledges much greater than 5 milligrams is needed even for a recommended therapeutic dose. (see C.R. Vol. 1, pages 109 – 119). Agent Downing clearly misstated the number of people that could be high from the amount of methamphetamine that Appellant was convicted of possessing.

Appellant timely filed a motion for New Trial on October 3, 2005. (See C.R. Vol. 1, pages 91-93). Appellant alleged ineffective assistance of Counsel and the use of false and misleading testimony as the grounds for the motion for new trial. On October 11, 2005, well within ten days of

filing the motion for new trial, Appellant's counsel both in person and via letter requested the Court set Appellant's motion for new trial for hearing (See Supp. C.R. Vol. 1, page 1). The Court refused to set the motion for new trial for a hearing and the motion was overruled as a matter of law.

From Appellant's conviction and sentence, Appellant now appeals.

ARGUMENT FOR ISSUE ONE

1. Did the court of appeals err in holding that the admission of false and misleading testimony by state witnesses did not violate petitioner's constitutional rights to a fair trial and to due process of law?

This Court has recognized that a conviction obtained through the use of false testimony reaches constitutional proportions. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S. Ct., 1173, 3 L. Ed. 2d 1217 (1959). 'A new

trial is required if 'the false testimony . . . in any reasonable likelihood could . . . have affected the judgment of the jury . . . .' Napue, supra, at 271, 3 L Ed 2d at 1222; Giglio v. United States, 405 U.S. at 154.

This Court has followed the United States Supreme Court by stating:

> Under Giglio v. United States, supra, a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. 92 S. Ct. at 766. It is clear that Petitioner could not have been convicted without [witness'] testimony. Under these circumstances we cannot conclude that the judgment of the jury could not have been reasonably affected by this testimony, and thus the conviction must be reversed.

Granger v. State, 683 S.W.2d 387, 391(Tex Crim App. 1984).

Petitioner's conviction and sentence was based in large part on false testimony from

Prosecution witnesses. DEA agent Downing testified that amount of methamphetamine Petitioner's were caught with was enough to get 45,000 people high. The Jury used this misinformed testimony to assess a life punishment for Petitioner. This testimony is false and thus violates Petitioner's due process rights.

As stated above earlier, it is clear that Agent Downing used a therapeutic dose and not a "hit" or a street dose in his testimony. The five milligram dose the Agent refers to is the normal dosage of the tablet for the prescription form of methamphetamine. A therapeutic dose is the amount needed to treat someone with either attention deficit disorder with hyperactivity or exogenous obesity. By its very nature a therapeutic dose is one which would be enough to treat the indicated symptom and allow the patient to be

functional in normal society, not be high. If five milligrams could achieve a "high", profit conscious drug dealers would not use the typical street sale unit of 125 milligrams.

The Agent misstated by at least five fold the number of people the 255 grams of methamphetamine could get high. The State's own witness during guilt innocence (Sgt. Bond) showed that this testimony was wrong when Sgt. Bond testified that there were only 10-15 hits in a gram. That would be a far cry less than the 200 doses claimed by agent Downey.

Petitioner filed with the trial court, post conviction, several pleadings and documents while the Court still had plenary power and jurisdiction over the case that would show that Agent Downey's were false. These would include scientific documents, expert affidavits, federal government

FDA filings and photographs showing the actual size of .005 grams. Neither the trial court nor the State Appellate Court's considered any of this evidence.

The State clearly used and emphasized the number 45000 in their punishment case. This number was referred to repeatedly in the State's close. The State argued that with enough methamphetamine to get 45000 people high, that Petitioner's crime was affecting every citizen of Smith County and Petitioner needed to be punished accordingly.

The number 45,000 or over half the population of the county had an incredible impact on the jury and directly led to the disproportionately harsh sentence Petitioner received. Particularly in light of this being the Petitioner's first felony offense with a relatively

minor past criminal history (two 'b' misdemeanor convictions) and strong family support. In addition, the amount of 255 grams was much closer to the bottom end of the range of weights that allowed this case to be a first degree felony possession case (200 – 400 grams).

Petitioner was clearly harmed by this perjurious, inaccurate and misleading testimony of Agent Downing, and Petitioner should have been granted a hearing to further develop this evidence. Where there only need to be a likelihood of misleading testimony affecting the jury to gain relief, Petitioner feels she has shown a definiteness that misleading testimony affected the jury in Petitioner's case. Petitioner is entitled to relief in the form of a new trial or at a minimum a new punishment hearing due to Agent Downing's perjurious, inaccurate and misleading testimony.

CONCLUSION

For the reasons set forth above, Petitioner Carrie Lane prays that a writ of certiorari issue to review the decision of the Texas Twelfth Court of Appeals and the courts below.

Respectfully Submitted,

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